

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2002 Session

**J.W., a minor, by next friend his mother, JEANA WATTS,
and JEANA WATTS, Individually
v.
MAURY COUNTY, TENNESSEE**

**Appeal from the Circuit Court for Maury County
No. 9101 Robert L. Holloway, Jr., Judge**

No. M2001-02768-COA-R3-CV - Filed March 11, 2003

This is a Tennessee Governmental Tort Liability Act case. The defendant county employed a school resource officer at a county school. A fourteen-year-old student at the school attempted suicide while at home. The mother of the student asked the officer to counsel the son. In the course of doing so, the officer invited the student to spend the night at the officer's home. While the student was at the officer's home, the officer gave him alcohol and sexually assaulted him. The mother filed suit against the county on behalf of her son and herself, alleging that the county was liable under the Tennessee Governmental Tort Liability Act for negligently hiring, disciplining, and training the officer, and that the county was liable for the officer's intentional torts under T.C.A. § 8-8-302. The trial court granted the county's motion for summary judgment. On the appeal, the plaintiffs assert that the officer, when he sexually assaulted the student, was acting "in the scope of his employment" under the TGTLA, and that he was acting "by virtue of or under color of [his] office" under T.C.A. § 8-8-302. We affirm in part and reverse in part, finding that the officer was not acting "in the scope of his employment," but that a genuine issue of material fact exists as to whether the officer was acting "by virtue of or under color of [his] office."

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part, and Remanded**

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

H. Tom Kittrell, Jr. and T.J. Cross-Jones, Nashville, Tennessee, for appellants, J.W., a minor, by next friend his mother, Jeana Watts, and Jeana Watts, individually.

H. Rowan Leathers III, Nashville, Tennessee, for appellee, Maury County, Tennessee

OPINION

In 1998 the Maury County Sheriff's Department ("Sheriff's Department") and the Maury County Public School System decided to implement the School Resource Officer Program ("Program"). The objective of the Program was to place a School Resource Officer ("SRO") in each public school who would serve as an adjunct staff member of the school. The SRO was to instruct students on law-related subjects, provide security, and foster positive relationships with the students and staff of the school.

Applicants for SRO positions were required to (1) take and pass a civil service test; (2) participate in multiple oral interviews; (3) pass a background investigation conducted by the Federal Bureau of Investigation and the Tennessee Bureau of Investigation; (4) pass a drug screening test; (5) pass a psychological examination; and (6) meet the requirements for certification as a law enforcement officer as enumerated in the Tennessee Code Annotated.

George Junior Jett IV ("Jett") applied for an SRO position. Prior to this application, Jett graduated from a certified law enforcement training academy. Jett successfully completed the application process. The only negative information the Sheriff's Department received about Jett during the application process was a comment from a former employer who said that Jett could at times be "cocky" or "mouthy."

Jett was hired as an SRO on October 16, 1998. He participated in an orientation session with the National Association of School Resource Officers ("NASRO"), and then attended a departmental orientation for approximately four weeks. In November 1998, Jett was placed at Whitthorne Middle School ("Whitthorne"). His immediate supervisor at the school was Whitthorne's principal, Bob Yancey ("Yancey"). Jett's Sheriff's Department supervisors were Captain James W. Harlan, Jr. ("Harlan") and Sargent Bobby Kilpatrick ("Kilpatrick").

During his training, Jett was provided with a copy of the NASRO Basic Course Manual ("Manual"). The Manual states that the SRO is to act as a "teacher," a "law enforcement officer," and a "counselor." The "counselor" role includes "[i]nformal counseling of students and parents based on the expertise of a law enforcement officer." The Manual states that the SRO should be available as a "resource to teachers, parents, and students for conferences on individual basis, dealing with individual problems or questions." A section of the Manual dealing with adolescent emotional issues instructs the SRO to "[s]how concern about feelings," "[i]nvolve parents, school counselor, [and a] social worker," "[f]ollow up with direct contact," and "[m]ake the immediate environment safe."

Shortly after Jett started working at Whitthorne, Yancey observed that Jett's popularity with the students at the school was distracting the students. He counseled Jett to maintain a friendly, yet professional, relationship with the students. In early December 1998, Yancey saw Jett with several male students in his car on school property. He again counseled Jett to maintain a professional relationship with the students. Yancey told Harlan and Kilpatrick about this meeting with Jett.

In mid-December 1998, the Sheriff's Department conducted an SRO staff meeting, which was attended by Jett, Harlan, and Kilpatrick. At this meeting, Kilpatrick told the SROs not to transport students in their personal vehicles. On December 18, 1998, Harlan and Kilpatrick met with Jett to discuss a complaint that, while on duty at school events, Jett allowed students to act "too close" and to "follow him around." They also discussed a report that Jett had contact with students outside of school. Jett admitted driving some students, but said it was at the request of their parents. Jett denied the other activities with the students. Harlan and Kilpatrick told Jett not to engage in such behavior, and Jett agreed not to do so. A few days later, Harlan and Kilpatrick, as well as the Maury County Personnel Director, met with Jett again to reiterate the importance of avoiding outside contact with students. They told him that he would lose his job if outside contact with students occurred.

On January 11, 1999, Plaintiff/Appellant J.W. ("J.W.") attempted suicide in the presence of his mother Plaintiff/Appellant Jeana Ward ("Mother"). In talking with her son after the suicide attempt, Mother asked J.W. if there was anyone in whom he could confide. J.W. mentioned three or four persons, one of whom was Jett.

The next morning, Mother contacted Jett at Whitthorne. Jett agreed to come to their home and to speak with J.W. When Jett arrived, he spoke with Mother first, and then with J.W. Later that day, Jett suggested that J.W. spend the night at his apartment. J.W. got Mother's approval to spend the night at Jett's apartment. Mother drove J.W. to Jett's apartment, and went into the apartment with him. When they arrived, Jett was wearing his uniform and his gun. Jett told Mother that he and J.W. were going to rent movies and eat pizza. Before Mother left Jett's apartment, another student from Whitthorne and his mother visited the apartment.

That evening, Jett and J.W. visited Jett's cousin, who gave Jett some marijuana. Jett and J.W. then stopped at a liquor store to get some alcohol. Jett and J.W. drank a "fifth" of liquor that evening. Afterwards, J.W. and Jett got into Jett's bed to sleep. J.W. woke up when Jett removed J.W.'s boxer shorts and began performing oral sex on him. When Jett pulled J.W. on top of him, J.W. used his thumbs to gouge Jett's eyes. The two scuffled and J.W. ended up in control of Jett's firearm. The two then drove around town in Jett's car, then returned to Jett's apartment. Jett drove J.W. to school the next day. J.W. spent the next night at Jett's apartment to "get drunk, and talk about different stuff."

A few weeks after the assault, J.W. told his aunt about the incident. The aunt told Mother, and Mother contacted the Sheriff's Department. Jett admitted to providing alcohol to students and his employment was immediately terminated. The Sheriff's Department notified the Tennessee Bureau of Investigation about the assault so that they could make an independent investigation into the matter.

On January 3, 2000, Jett pled guilty to, among several charges, statutory rape, attempted aggravated sexual battery, and sexual battery by an authority figure.

On April 17, 2000, Mother and J.W. (collectively referred as “Plaintiffs”) filed suit against Maury County, Tennessee (“County”), under the Tennessee Governmental Tort Liability Act (“TGTLA”). In the lawsuit, they alleged that the County was negligent in failing to properly investigate Jett’s background when he was hired, in failing to adequately discipline Jett for prior similar incidents, and in failing to properly train Jett before placing him in a position of authority. They also alleged that, under Tennessee Code Annotated §§ 8-8-301 to 303, the County was liable for Jett’s intentional torts. The Plaintiffs sought \$1,000,000 in damages.

Section 29-20-205 of the Tennessee Code Annotated, also known as the Tennessee Governmental Tort Liability Act, waives sovereign immunity under certain circumstances. It states in part that “[i]mmunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee *within the scope of his employment . . .*” Tenn. Code Ann. § 29-20-205 (2000) (emphasis added). The Plaintiffs also sought damages under section 8-8-302 of the Tennessee Code Annotated, entitled “Suits against counties for wrongs of deputies.” This statute states:

Anyone incurring any wrong, injury, loss, damage or expense resulting from any act or failure to act on the part of any deputy appointed by the sheriff may bring suit against the county in which the sheriff serves; provided that the deputy is, at the time of such occurrence, *acting by virtue of or under color of the office.*

Tenn. Code Ann. § 8-8-302 (1993) (emphasis added). Thus, in order to recover from a governmental entity for the intentional misconduct of a deputy under this statute, it must be established that the misconduct occurred while the deputy was acting by virtue of or under color of his office. *See* Tenn. Code Ann. § 8-8-302; **Jenkins v. Loudon County**, 736 S.W.2d 603, 610 (Tenn. 1987).

The County moved for summary judgment, arguing that (1) Jett was not acting by virtue of or under color of his office at the time of the assault; (2) Jett was acting outside the scope of his employment, (3) there was no evidence of negligent hiring, training, or discipline, and (4) the County had discretionary function immunity for the alleged claims of negligent hiring and training. In support, the County cited **Corder v. Metropolitan Government of Nashville and Davidson County**, 852 S.W.2d 910 (Tenn. Ct. App. 1993). In **Corder**, the defendant, an off-duty police officer, fatally shot an acquaintance. *Id.* at 911. The victim, a mentally handicapped man, had received rides from the officer in the past. The victim asked the officer for a ride home while the officer was in uniform but off duty. As a joke, the officer pointed his service pistol at the victim. *Id.* at 914. It accidentally discharged, killing the victim. *Id.* Even though the officer was wearing his badge and had his weapon, the **Corder** court found that the defendant was not “acting within the scope of his employment” or “by virtue of or under color of his office,” but rather, “was an off-duty officer, on his way home from work who was ‘teasing’ a friend or acquaintance.” *Id.* On this basis, the grant of summary judgment was affirmed. *Id.* at 915.

In the case at bar, the trial court granted the County's motion for summary judgment. The trial judge found that Jett was "not acting within the scope of his employment, nor was he acting by virtue of, or under color of his position as an SRO" when he assaulted J.W. Citing **Corder**, the trial court noted that Mother knew that Jett was off duty, and said that Jett offered "to allow her son to spend the night at his apartment as a favor or accommodation." Mother did not check with Jett's supervisors at Whitthorne or the Sheriff's Department "to determine if such highly unusual conduct was appropriate or permitted." On this basis, the trial court concluded that there was "no genuine issue of material fact as to whether Jett was acting in the scope of his employment, or by virtue of, or under color of his office at the time he assaulted [J.W.]." From this grant of summary judgment, Mother and J.W. now appeal.

On appeal, Mother and J.W. argue that the trial court erred in granting the County's motion for summary judgment because, when Jett assaulted J.W., under the TGTLA, Jett was acting in the scope of his employment. They also contend that, under section 8-8-302, Jett was acting by virtue of or under color of his office.

A motion for summary judgment should be granted when the movant demonstrates that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. **Bain v. Wells**, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.* In **Byrd v. Hall**, 847 S.W.2d 208 (Tenn. 1993), our Supreme Court stated:

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 [now Rule 56.06] provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial.

Id. at 211 (citations omitted). Thus, after the moving party establishes that there is no genuine issue of material fact, the nonmoving party must set forth evidence showing that a genuine issue of material facts exists. *See Byrd v. Hall*, 847 S.W.2d at 210 (citations omitted). Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. **Carvell v. Bottoms**, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. **Bain v. Wells**, 936 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. **Warren v. Estate of Kirk**, 954 S.W.2d 722, 723 (Tenn. 1997).

We first address the issue of whether Jett was acting within the scope of his employment under the TGTLA when he assaulted J.W. The Plaintiffs allege that Jett was acting within the scope of his employment because, as the SRO Manual instructs, Jett was “following up” on his initial contact with J.W. at J.W.’s home, and because he was acting as a “resource” to Mother. The Plaintiffs point to Jett’s criminal conviction for “Sexual battery by an authority figure” as showing that Jett was acting in the scope of his employment.¹

Whether an employee is acting within the scope of employment was recently addressed by this Court in *Morris v. Collis Foods, Inc.*, No. W2001-00918-COA-R3-CV, 2002 Tenn. App. LEXIS 441 (Tenn. Ct. App. June 19, 2002). The *Morris* decision states:

[W]hether an employee is acting within the scope of his or her employment is a question of fact. However, it becomes a question of law when the facts are undisputed and cannot support conflicting conclusions.

Thus, whether an employee is acting within the scope of his employment can be reviewed as a question of law when the employee’s acts are clearly beyond the scope of his authority.

Morris at *8 (citing *Tenn. Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.*, 840 S.W.2d 933, 937 (Tenn. Ct. App. 1992) (citations omitted)). The *Morris* court continued:

The facts of this case are largely undisputed. Accordingly, we must look to these facts to determine whether Ms. Shaw clearly acted outside the scope of her employment. If the facts can only support the conclusion that Ms. Shaw acted in such a manner, we must affirm the trial court’s decision to grant summary judgment to Appellee.

In outlining the framework to be followed in determining whether an employee’s acts are within the scope of employment, this Court has often looked to the Restatement (Second) of Agency. The Restatement declares:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

¹ Under section 39-13-527 of the Tennessee Code Annotated, “Sexual battery by an authority figure” can occur when there is an unlawful sexual contact, the victim is between the ages of thirteen and eighteen years, and a “defendant had, at the time of the offense, supervisory or disciplinary power over the victim by virtue of the defendant’s legal, professional or occupational status and used such power to accomplish the sexual contact” Tenn. Code Ann. § 39-13-527(a)(1)(A) (2002).

(c) it is actuated, at least in part, by a purpose to serve the master; and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

Morris at *10 (citing Restatement (Second) of Agency § 228, p.504 (1957)). The *Morris* court added that, for the defendant's actions to be within the scope of employment, the "conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Morris* at *9 (citing Restatement (Second) of Agency, § 229, p.506).

In *Morris*, a waitress was provoked by a patron. In response, she threw an object at the patron. The *Morris* court noted that the waitress's conduct deviated from the restaurant's policies for dealing with unruly customers as well as a direct mandate against such behavior. In addition, the waitress was convicted of the crime of assault based on her actions. The *Morris* court also found that the waitress's actions were not taken in furtherance of the restaurant's business, but rather, were personal in nature. Under these circumstances, the *Morris* court found that the waitress's acts were clearly outside of the scope of her employment, and therefore, that the trial court had properly granted summary judgment on that issue.

Considering the Restatement factors noted in *Morris*, in this case it is apparent that Jett was not hired to have sleepovers with students, nor did the sleepover or the assault occur within authorized time and space limits. Rather, prior to the assault, Jett's superiors had disciplined him at least twice for fraternizing in an unprofessional manner with students. Jett's actions were not to benefit the County, nor would such a sleepover be expected or condoned by the County. As with the waitress in *Morris*, Jett not only deviated from County SRO policies in having J.W. sleep at his apartment, he directly contravened his supervisors' orders to discontinue unprofessional socializing with students. Like the waitress in *Morris*, Jett was convicted for his criminal activity. Jett's acts were not in furtherance of his employer's business, but were to satisfy his own base desires. Under these circumstances, we must conclude that the trial court did not err in finding that Jett was acting outside the scope of his employment and in granting the County's motion for summary judgment on the Plaintiffs' claim under the TGTLA.

The Plaintiffs next argue that the trial court erred in granting the County's motion for summary judgment under section 8-8-301 of the Tennessee Code Annotated because, at the time Jett assaulted J.W., Jett was "acting by virtue of or under color of [his] office." The Plaintiffs note that the NASRO Manual instructs the SRO to act in the role of teacher, counselor, and law enforcement officer. Mother's initial contact with Jett was because of Jett's position as an SRO at Whitthorne. The Plaintiffs emphasize that, based on his assault on J.W., Jett was convicted of the crime of "Sexual battery by an authority figure."

Sections 8-8-301 to 303 of the Tennessee Code Annotated do not define the phrase “by virtue of or under color of the office.” In **Corder**, the Court noted that the sheriff’s deputy was off duty and had been drinking alcohol at a club with friends. **Corder v. Metro. Gov. Of Nashville and Davidson County**, 852 S.W.2d 910, 911 (Tenn. Ct. App. 1993). He stopped at a convenience store and the victim, an acquaintance of the officer, asked the officer for a ride home. **Id.** The evidence indicated that the officer showed the victim his gun not in any official capacity, but rather to tease the victim and cause him to “stop begging for a ride.” **Id.** at 914. The officer was wearing his uniform but had his firearm in his automobile. **Id.** at 914. The Court concluded that, under these circumstances, “the shooting was not by virtue of or under color of the office of Deputy Sheriff.” **Id.** at 914.

This case presents a closer question. Here, Jett was contacted by Mother at least in part because of his position as an SRO. Jett utilized his status as an SRO to persuade Mother to trust him to allow J.W. to sleep at his apartment.

A criminal statute, section 39-16-402 of the Tennessee Code Annotated, is instructive on the interpretation of the phrase “by virtue of or under color of office.” Section 39-16-402 provides:

(a) A public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly:

. . . (2) Commits an act under color of office or employment that exceeds the servant’s official power. . . .

(b) For purposes of subdivision (a)(2), a public servant commits an act under color of office or employment who acts or purports to act in an official capacity *or takes advantage of such actual or purported capacity.*

Tenn. Code Ann. § 39-16-402 (1997) (emphasis added). Thus, when a deputy sheriff intentionally or knowingly uses his office to facilitate a crime, he is acting under color of his office under this statute. **See also** Tex. Penal Code Ann. § 39.02 (Vernon 2002); **Bryson v. Texas**, 807 S.W.2d 742 (Tex. Crim. App. 1991).

Under the circumstances of this case, we must conclude that a genuine issue of material fact exists as to whether Jett took advantage of his capacity as an SRO to facilitate his sexual assault of J.W., and thus, whether Jett was acting by virtue of or under color of his office. Consequently, the trial court’s grant of summary judgment to the County on the Plaintiffs’ claims under section 8-8-302 of the Tennessee Code Annotated must be reversed.

The decision of the trial court is affirmed in part and reversed in part as set forth above, and the cause is remanded for further proceedings consistent with this Opinion. Costs are taxed one-half to the appellants, J.W., a minor, by next friend his mother, Jeana Watts, and Jeana Watts, individually, and their surety, and one-half to the appellee, Maury County, Tennessee, for which execution may issue, if necessary.

HOLLY KIRBY LILLARD, JUDGE